



REPUBLIC OF KENYA



**Director of Public Prosecution v Kuazwa (Sexual Offence  
037 of 2019) [2023] KEMC 278 (KLR) (14 August 2023) (Judgment)**

Neutral citation: [2023] KEMC 278 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
SEXUAL OFFENCE 037 OF 2019  
ZK KAGENYO, RM  
AUGUST 14, 2023**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTION ..... REPUBLIC**

**AND**

**ALI KASSIM KUAZWA ..... ACCUSED**

**JUDGMENT**

1. The accused person was on 8<sup>th</sup> March 2019 arraigned for the offence of defilement contrary to section 8 (1) (4) of the Sexual Offence *Act No. 3 of 2006*. (Sic).

The particulars were that on the diverse date between late July 2018 to February 2019 at unknown time at [Particulars Withheld] village in Tsimba location Kundutsi sub-location in Kwale county within coast region intentionally and unlawfully caused his penis to penetrate the vagina of N.M a girl child aged 16 years.

2. In the alternative, he was charged for the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

The particulars were that on the diverse dates between late July 2018 to February 2019 in [Particulars Withheld] village in Tsimba location Kundutsi sub-location in Kwale county within coast region intentionally and unlawfully touched the vagina of N.M a girl child aged 16 years with his penis.

3. The accused denied the charges and a trial ensued.
4. The accused person was not represented. At all material times of the trial, he was present in court save as for his abscondment that led to cancellation of his bond. The matter was conducted in Kiswahili Language, the language of choice by the accused.
5. If the practice in criminal trials would have adopted the practice in civil trials in its entirety in that parties were to be allowed to file a list of agreed issues and that of disputed issues, this case would be



the best candidate to fit in that category of cases. If such practice was further adopted, the monster of case backlog would be eradicated as such files as this one with absolutely clear undisputed issues would not take 1596 days within the court system, 55 court appearances and handled by more than 6 judicial officers at different times whereas the main issue under contest is age and nothing else but age of the complainant.

6. It is trite law that in a case of defilement, the State has to prove beyond reasonable doubt as against the accused person the three elements of the offence of defilement being;
  - i. Age of the survivor/ victim;
  - ii. Penetration; and
  - iii. Positive identification.
7. All along this case, it would appear that the accused was not attacking the elements of penetration or positive identification but what he endeavored to dispute was the age of the survivor.

#### **Prosecution's case**

8. The prosecution, to discharge their duty under section 107 of the *Evidence Act* called a total of 6 witnesses.
9. The theory of the DPP's case was that, the accused person was at one time close to the complainant's family and he took advantage of that closeness and out of it developed an intimate relationship with the complainant that led to frequent sexual intercourse and finally a pregnancy arose from the sexual intercourse.
10. When she realized that she is pregnant, the complainant with the innocence of a child informed her parents asking for their forgiveness and having let the cat out of the bag, investigations were conducted that placed the accused as the person responsible for the pregnancy and as the complainant was said to be a minor aged 16 years, the accused was charged with the present indictments.
11. From the evidence by the prosecution witnesses, it emerged that, the complainant was under the age of 18 years, she had sex frequently with the accused which resulted to a pregnancy and she knew the accused in great details not to occasion any mistaken identity.

#### **Defence case**

12. The accused person was placed on his defence under section 210 of the Criminal Procedure Code, and section 211 of the Criminal Procedure Code and Article 50 (2) (i) having been explained to the accused person, he, in person, elected to defend himself by way of tendering unsworn evidence without calling any witnesses.
13. His defence was that whereas it is true that he had sex with the complainant and sired an issue therefrom, the complainant misled him by telling him that she was 18 years of age. He contested that the complainant misled him both by word of mouth and the assurances therein and by his own observation on her appearance as she was endowed with "maumbile makubwa yaliyopingana na umri wake" loosely translated to (the complainant had a big body beyond her age.)
14. The rest of his defence constituted what appeared to be mitigation upon conviction and implored the court to endeavour to, in whatever decision it makes, be a channel to his reunification with his child, the complainant's baby.
15. After the testimony of DW 1, the Accused closed his case.



16. The Court invited the parties to put in their closing arguments but none opted to put in any, both electing to place their reliance on the record in the court file.
17. Having heard both parties at their full lengths, the court retired to make its decision.

### **Analysis and Determination**

18. As pointed out earlier, the DPP was required to prove as against the accused person the three elements for the offence of defilement, being, age, penetration and identification.

#### **a. Age**

19. By way of a Certificate of Birth produced as P. Exh 2, indicating the Date of Birth as 21<sup>st</sup> February 2003 and its holder as N the daughter of M.O.C and F.A.K, the element of age was proved beyond reasonable doubt. The authenticity of the said document or any entry within it was not attacked by the accused. Through it, it can therefore be said that, as at 31<sup>st</sup> July 2018, the complainant was 15 years and 5 months old while as at 28<sup>th</sup> February 2019 she was 16 years and 7 days old.
20. This consequently brings the charges against the accused under both sections 8 (3) and 8 (4) of the [Sexual Offences Act](#), which influence the sentencing if one is found guilty.

#### **b. Penetration**

21. By way of oral evidence by PW 1, the complainant, and DW1, the accused, they said that they had sex with each other as they had developed a mutual intimate relationship. The period of such sexual intercourse as stated in the charge sheet was not challenged. The Medical Practitioner, PW 5, stated that he examined the complainant and produced the Medical Examination Report, Police Form P3 as P. Exh 1 the document whereat he made his observations. After the examination, he concluded that there had been penetration into the vagina of the complainant.
22. As a result of the penetration, there was observed to have been a pregnancy, of which the accused person took credit of. The prosecution made an application under section 36 of the [Sexual Offences Act](#) for a DNA test and by way of a Human Identification Report dated 12<sup>th</sup> August 2021 and produced by the Government Analyst, PW 3, as P.Exh 4, it was confirmed that indeed the accused person had 99.99+ % chances of being the father to the born issue, the child of A.M, the complainant. This corroborated by the evidence of the complainant and the accused himself, seals it to a hundred percent maternity and paternity respectively and given that no scientific procedures were said to have been undertaken on the complainant such as IVF process I find that the prosecution proved the element of penetration beyond reasonable doubt.

#### **c. Positive identification**

23. The complainant stated that they had an intimate relationship with the accused who used to live at their house. The accused confirmed as much. There could be no doubt on positive identification of the assailant and I make a finding as much.
24. The court at this juncture is satisfied that the offence of defilement was committed. However, when called upon to give an explanation, the accused pleaded for the statutory defence under section 8(5) and 8(6) of the [Sexual Offences Act](#). The said subsections provide that;

Section 8 (5):

It is a defence to a charge under this section if;-



- a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- b. the accused reasonably believed that the child was over the age of eighteen years.

#### Section 8 (6)

The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

25. A reading of these parts of the statute clearly places a burden on any person in the society who have intentions of having sex with another to satisfy himself or herself that that other person is not a child. If it turns out that his test satisfies him or her that the said other person is not a child, and it turns out that the long arm of the law catches up with him and alleges that that other is a child, it is upon him to now demonstrate the steps he took to satisfy himself that the other was not a child.
26. The standard placed on the accused under section 8 (5) is just one, that the accused in a bid to do his due diligence was misled by the child.
27. In *Eliud Waweru Wambui v Republic* [2019] eKLR the Court of Appeal guided that,

Subsection (5) states that it is a defense to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. We think it a rather curious provision in so far as it is set in conjunctive as opposed to disjunctive terms which would seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection (5)(b) that separates it from the belief proceeding from deception in subsection (5)(a). We would therefore opine that the elements constituting the defence should be read disjunctively if the two subsections are to make sense. We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.
28. The question that this court begs to answer is, was the defence as raised by the accused person plausible enough to exonerate him from the web the prosecution evidence has entangled him into?
29. Justice Mrima in *Irene Atieno Ochieng v Republic* [2017] eKLR held thus,

The accused person will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or actions on the part of the child.
30. On her part, Justice Gitari in *Royton Muriungi Kirimi v Republic* [2020] eKLR guided that,

This section requires that an accused person raises this defence at his trial. Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence under Section 5 & 6 of *Sexual Offences Act* the evidential burden shifts on that accused person to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable. What this provision is stating is that the accused who wishes to rely on the defence must lay that basis during the trial.



This would give the prosecution an opportunity to interrogate the defence and an opportunity to respond. The appellant did not raise the defence during the trial. He has raised this defence on appeal. This ground is an afterthought. His defence was that he was framed. He cannot allege on appeal that he was deceived by the complainant. The defence cannot be considered at this stage. It is an afterthought.

31. I use these principles while well aware that the accused was unrepresented and hence some technical aspects of raising a defence could be beyond his reach. However, in the spirit of discerning the truth and justice, the court analysed the evidence as a whole.
32. Firstly, I notice that when the complainant was testifying, she said that she was 16 years old at the time of the incidence. The accused person at that juncture of the testimony stated that he had not been supplied with the birth certificate of the complainant which caused the complainant to be stood down for the accused to be supplied with a copy of the birth certificate which was done. When the matter came up for the cross examination of the complainant, the accused did not challenge her age despite the fact that her mentioning of the age and the supplying of the copy of the birth certificate would have triggered his mind and hence I find the defence as an afterthought.
33. Secondly, I note that the accused had been hired by the complainant's father to be taking the complainant and her sister to school. The complainant said that the sexual intercourse started when she was in class six all the way to class 7. She was a primary school child. Cautious not to be misconstrued to be insinuating that a primary school pupil is by default a child, it is my opinion that whenever one interacts with such a school child has a duty to, if he has intention to have sex with her, start with the assumption that he or she is a child and thereafter confirm her age satisfactorily. The accused did not endeavour to establish the age of the complainant before engaging in sexual intercourse with her and hence his defence must fail as it does not meet the statutory threshold under section 8 (5) of the *Sexual Offences Act*.
34. Lastly, the accused said that he observed the complainant and saw that she had a big body and hence got deceived. I will respectfully reject this defence as there is no evidence that even though the complainant was big-bodied, she took any positive steps to deceive the accused and hence if at all his observation deceived him, he has himself to blame as it would be as a result of the limited discernment attributable to either ignorance or complacency on the part of the deceived and not attributable to any action or inaction on the part of the alleged deceiver. Sections 8 (5) and 8 (6) contemplates of the latter to amount as a defence and not the former.
35. The accused did not grant the prosecution an opportunity to cross examine him and challenge his defence. I find his defence as just a way of clutching to a straw when he verily knew from the onset when he was having sex with the complainant the repercussions of his actions.

## **Disposition**

36. From the foregoing, I make a finding that the DPP has furnished evidence before this court proving beyond reasonable doubt that indeed the accused person defiled the minor victim initialized as N.M and I thus find him guilty of the same and convict him under section 215 of the Criminal Procedure Code for the main count of defilement of a child aged 16 years which is proscribed by section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*.
37. Turning on to the alternative count, having made a finding in the main count, the alternative count rests determined.



38. The accused person is hereby informed of his right to lodge an appeal against this judgment and the conviction in the High Court within 14 days from today's date if dissatisfied with this court's finding.

39. The matter shall now be slated for sentence hearing on 15<sup>th</sup> August 2023.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 14<sup>TH</sup> DAY OF AUGUST 2023.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

In the presence of:

Mr. Archibald Kimbada- Court Assistant.

Ms. Wangari Mwaura, Principal Prosecution Counsel, for the State.

Ali Kassim Kuazwa - Accused.

